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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ANTHONY WESTERN,

Defendant and Appellant.

B210081

(Los Angeles County Super. Ct.
No. LA057926)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene Schempp, Judge. Affirmed.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

In a bifurcated proceeding, the jury found defendant and appellant John Anthony Western guilty of first degree burglary, with a person present, in violation of Penal Code section 459.¹ Defendant waived his right to a jury trial on the recidivist allegations, and he subsequently admitted two prior serious or violent felony convictions within the meaning of the three strikes law. (§§1170.12, subds. (a)-(d), 667, subds. (b)-(i)). Defendant received a sentence of 30 years to life, consisting of 25 years to life for the burglary and 5 years for a prior serious felony conviction under section 667, subdivision (a)(1). The trial court struck the prior prison term enhancements under section 667.5, subdivision (b), in the interests of justice.

In his timely appeal, defendant contends the trial court (1) failed to obtain a valid waiver of defendant's constitutional rights in connection with his admission of the recidivist allegations and (2) abused its discretion by denying defendant's *Romero*² motion to strike at least one of his two prior strike convictions. We affirm.

STATEMENT OF FACTS³

On January 25, 2008, Maria Reyes awoke to the sound of her apartment door opening. She opened the door to the hallway and saw a man, later identified as defendant, standing inside her living room. Reyes asked defendant who he was and he claimed the manager had sent him to check on the apartment because it was raining. She asked for identification and defendant opened his wallet and showed her a California identification card and a Social Security card. After defendant displayed them, he left through the front door.

¹ All further statutory references will be to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.

³ As this appeal presents no issue of sufficiency of the evidence to support the convictions, we state the facts in the light most favorable to the judgment.

During that encounter, Reyes woke her husband, Raul DeJesus, who woke his brother, Oscar DeJesus. The two of them went to speak with the building manager, who informed them that he had not sent anyone to the apartment. After they returned, Oscar noticed some keys were missing from a hook by the front door. Through a window, the brothers observed defendant smoking a cigarette in the building's parking area. Reyes called the police while Raul and Oscar went outside to ask him if he had taken their keys. Defendant told them to stand back and that he "didn't want any problems." Defendant pulled out a screwdriver and a multi-purpose tool that resembled a blade, pointed them at Raul and Oscar, and stepped towards them. The brothers backed away, and defendant attempted to flee by jumping over a gate.

Raul and Oscar ran after defendant and caught him when he unsuccessfully tried to jump over another gate. Defendant agreed to show them where the keys were, but on the way back to the apartment, he tried to run away and again pulled out the blade-like instrument. He said he did not want any trouble and threw it on the ground. Defendant looked for the keys before walking across the street and entering another apartment building.

The police arrived 10 to 15 minutes later and located defendant. During a consensual search of defendant's mother's apartment, police recovered the screwdriver defendant had pointed at Raul and Oscar. The keys were recovered in the street gutter nearby.

DISCUSSION

I. Prior Conviction Admissions

Defendant contends the trial court failed to properly advise defendant of his *Boykin-Tahl*⁴ rights prior to accepting defendant's admissions to the recidivist

⁴ See *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

allegations, pursuant to *In re Yurko* (1974) 10 Cal.3d 857, 863. As our Supreme Court explained in *People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*), “before accepting a criminal defendant’s admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. [Citation.] Proper advisement and waivers of these rights in the record establish a defendant’s voluntary and intelligent admission of the prior conviction. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178-1179 (*Howard*); *North Carolina v. Alford* (1970) 400 U.S. 25, 31.)” (*Mosby, supra*, at p. 356.) However, a defective *Boykin-Tahl* advisement does not require automatic reversal. (*Id.* at pp. 360-361.) When a defendant does not expressly waive these rights, a reviewing court examines the entire record to determine whether the admission was voluntary and intelligent under the totality of the circumstances. (*Id.* at p. 360.)

Defendant’s chief contention is that the circumstances of his admissions amount to a “silent record” case because no advisement was given on the morning when he made his admissions. We disagree because defendant was advised of, and waived, his right to a jury trial at the end of the previous day’s court proceeding and there were no intervening events before his admission.

Mosby made it clear that “[t]ruly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant’s admission of a prior conviction.” (*Mosby, supra*, 33 Cal.4th at pp. 361-362.) In such cases, where “the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.” (*Id.* at p. 362.) However, the *Mosby* court distinguished silent-record cases from those in which the defendant had been given incomplete *Boykin-Tahl* advisements, holding that “when, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial,” the admission will be deemed voluntary and intelligent if the totality of circumstances surrounding the

admission supports such a conclusion. (*Mosby, supra*, at p. 356.) This is true even though the defendant was not told of the rights to remain silent and to confront adverse witnesses. (*Ibid.*)

Defendant's advisement cannot be meaningfully distinguished from the incomplete advisement found in *Mosby*. Here, immediately after the jury delivered its verdict on June 26, 2008, defendant's counsel informed the trial court that defendant intended to waive his right to a jury trial on the prior conviction allegations. The prosecutor explained to defendant that he had a right to a jury trial regarding the special allegations and enhancements for his prior convictions and asked if defendant understood. Defendant responded that he did. The prosecutor then asked, "Are you waiving your right to a jury trial and agreeing to a court trial so that the judge may decide the issue of the prior convictions alleged on the information?" Defendant responded affirmatively and counsel joined. The court dismissed the jury at 4:15 p.m. and adjourned the trial until the next day. When the proceedings began on the following day at 10:00 a.m., defendant's counsel informed the court that defendant wanted to admit the prior convictions without a court trial. Defendant confirmed his intention and admitted all of his prior convictions. Finally, defendant's counsel represented defendant understood that by admitting the two burglaries, defendant was also admitting the two prior strikes. Thus, as in *Mosby*, the record is clear that the prosecutor expressly advised defendant of his right to a jury trial, and defendant waived that right prior to making his admissions.

It would elevate form over substance to consider this a "silent record case," when the only period of silence was the adjournment between the afternoon and morning sessions of a trial. Where the period of time between advisements and admissions was less than 24 hours and there was no intervening proceeding between the waiver and the admission, it makes little sense to analogize the situation to one in which no advisement was given.

We turn to whether the admission was voluntary and intelligent under the totality of the circumstances. Again, the circumstances of the *Mosby* case are materially

indistinguishable from those present here. In *Mosby*, the defendant was advised of his right to a jury trial on the prior conviction allegation immediately after the jury found him guilty of his substantive offense of selling cocaine. (*Mosby, supra*, 33 Cal.4th at p. 364.) The defendant waived that right and then admitted the recidivist allegation. “On appeal, defendant contended that the trial court committed reversible error by not telling him of his rights to remain silent and confront witnesses.” (*Ibid.*) The *Mosby* court, however, rejected that contention: “Here, defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.” (*Ibid.*)

Defendant also expressly waived his right to a jury trial on the prior conviction allegations. As in *Mosby*, defendant was not expressly advised of his privilege against self-incrimination or his right to confront and cross-examine witnesses as to the allegations. However, defendant had just participated in a trial in which he exercised each of those rights. Defendant’s counsel cross-examined Ms. Reyes, Raul DeJesus, Oscar DeJesus, defendant’s mother, and the two police officers who testified. Moreover, the trial court explained during *voir dire*, in defendant’s presence, that “a defendant in a criminal trial has a constitutional right not to be compelled to testify.” (See *Mosby, supra*, 33 Cal.4th at p. 361 [“the reviewing court must examine the record of ‘the entire proceeding’ to assess whether the defendant’s admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances”].) The court provided the same admonition as part of the jury instructions before the jury went into deliberations on June 26, 2008, the day before defendant admitted his priors. Those statements, coupled with defendant’s decision not to testify during the trial on the burglary, amount to compelling evidence that he was aware of this right.

There is no reason for us to infer that defendant did not understand or was unaware of these rights only one day after the trial on the underlying offense concluded.

Taking the totality of the circumstances into consideration, and noting the close factual similarities to *Mosby*, we hold defendant's admissions were voluntarily and intelligently made.

II. *Romero* Motion

Defendant next argues the trial court abused its discretion by denying defendant's *Romero* motion to strike at least one of his two prior strike convictions. Our review of the record reveals no abuse of discretion.

Under section 1385, the trial court has discretion to strike a prior felony conviction allegation in furtherance of justice. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) In order to do so, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

While a trial court must enter a statement of reasons in the minutes of the court when dismissing a prior conviction, the trial court is not required to "explain its decision not to exercise its power to dismiss or strike." (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) ""The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 (*Alvarez*), quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)" (*Carmony, supra*, at pp. 376-377.) Accordingly, we review the trial court's decision to determine whether it is "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

Defendant contends the trial court abused its discretion by denying the *Romero* motion because defendant fell outside of the spirit of the three strikes law. In support, he argues that several factors compelled the trial court to strike one of his prior convictions, including the remoteness and nature of the two strike priors, the facts in the instant case, his strong family support, and his drug and alcohol dependency. We address each in turn.

First, defendant argues that the remoteness and nature of the two prior burglary convictions, emanating from a single prosecution in 1988 for which one prison term was served, support striking at least one of those prior strikes. In doing so, he asserts the trial court erred in focusing exclusively on his recidivism. For several reasons, we reject this argument. Foremost, we again note that the trial court is not required to “‘explain its decision not to exercise its power to dismiss or strike.’” (*Carmony, supra*, 33 Cal.4th at p. 376.) In any event, as the trial court explained, defendant committed numerous crimes throughout his adult life. Indeed, as defendant concedes, at least one of those offenses was violent.

The record shows that defendant’s criminal history is substantial. In 1987, defendant was convicted of taking a vehicle without the owner’s consent. In 1988, defendant was convicted on two counts of burglary for which he received his first two strikes. In 1992, defendant was convicted of assault with a deadly weapon or force likely to produce great bodily injury. In 1993, defendant was convicted of reckless driving. Later that same year, defendant was convicted of soliciting the commission of certain offenses. In 1993, 1996, and again in 1999, defendant was convicted of taking a vehicle without the owner’s consent. In 2006, defendant was convicted of driving under the influence of alcohol and providing false information to a police officer. In 2007, defendant was arrested for a violation of his probation. It should also be noted that most of those offenses were committed while defendant was on probation or parole.

Defendant relies on *People v. Garcia* (1999) 20 Cal.4th 490, 501 (*Garcia*) for the principle that while recidivism is a relevant factor, courts should not place undue emphasis on that factor. (See also *Alvarez, supra*, 14 Cal.4th at p. 979.) *Garcia* and *Alvarez* involve cases in which the trial court exercised its discretion in either dismissing

strikes or reducing an alternate felony/misdemeanor to a misdemeanor. Neither case at any point suggests such action was compelled. To the contrary, *Garcia* merely held that the decision to dismiss a prior strike as to one count but not another was not outside the bounds of reasons, but the court certainly never suggested that such action was compelled by section 1385. (*Garcia, supra*, at p. 503.) *Alvarez* held that the trial court's decision to reduce an alternate felony/misdemeanor to a misdemeanor in a three strikes prosecution was close to being an abuse of discretion, while ultimately deferring to the trial court's decision. (*Alvarez, supra*, at p. 980.) Here, in contrast, the trial court refused to strike a prior conviction in light of defendant's recidivism. The fact that a trial court *may* exercise its leniency despite a recidivist history hardly entails an abuse of discretion when it declines to do so. There is certainly nothing unreasonable in the trial court finding that defendant's unrelenting criminality brings him within the spirit of the three strikes law. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320.)

Defendant next contends that the facts of the current conviction supported an affirmative ruling on the *Romero* motion, in light of defendant's efforts to avoid any confrontation with the victims that could have resulted in violence. Defendant points out that he left the apartment after making an excuse so as not to provoke the victims, he repeatedly said that he did not want any trouble, and he did not attempt to use the screwdriver and blade-like instrument. However, it is not unreasonable to presume that the trial court instead considered brandishing the weapons to be a violent act, or at least more likely to provoke violence than to discourage it. Defendant displayed the instruments on two separate occasions, at one time pointing them at the victims and stepping forward as if he were going to attack. The fact that the victims backed away demonstrates they were threatened by the act. We cannot say that no reasonable person would have reached the same conclusion.

Finally, defendant argues that several additional circumstances favored striking one of the remote priors, including strong family ties, his drug problems, the court's reference to him as a "nice person," and that he still faced considerable prison time even if the motion was granted. However, those factors, even if credited, would not require

the granting of his motion. As the trial court observed, defendant had numerous chances to resolve his substance abuse problem in his many run-ins with the law, but failed to do so. The trial court was not required to treat defendant's failure to come to grips with his substance abuse problem as a mitigating factor.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.